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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE, Plaintiff and Respondent, v. CIARA ALESSANDRA SHORT, Defendant and Appellant.	C085252 (Super. Ct. No. 16CF04855)

A jury found defendant Ciara Alessandra Short guilty of first degree burglary with a person present. On appeal, defendant contends the trial court erred in instructing the jury with CALCRIM No. 361, that it could draw adverse inferences from her failure to explain or deny evidence against her. She also contends the trial court erred in imposing a fine pursuant to Penal Code section 672.[1] We will affirm.

[1] Undesignated statutory references are to the Penal Code.

I. BACKGROUND

Defendant was charged with burglary of the victim's home. At trial, the victim's house cleaner testified. The cleaner explained that, on the day of the incident, she arrived at 9:00 a.m. to clean the victim's house. Walking up the driveway, she was approached by defendant who started walking next to her. Defendant acted as though she was supposed to enter the house with the cleaner.

The cleaner, thinking defendant might be a friend of someone staying with the victim, asked, " 'Oh, do you know [the victim]?' "[2] Defendant said yes. The cleaner then went into the house followed by defendant.

The cleaner put down her supplies in the kitchen and saw defendant walk toward the bedrooms. The cleaner asked, " 'Oh, are you here to get your things?' " She testified she could not recall if defendant answered, but "if she did it was kind of mumbly."

The cleaner started cleaning the kitchen. About a half hour later, defendant came into the kitchen and set down a reusable shopping bag. The bag hit with a thud, as though something was inside. The cleaner said, " 'Oh, you're getting—that's your stuff.' " She did not recall defendant responding.

At some point, defendant took a biscotti from the cookie jar and ate it. The cleaner said, " 'Oh, you're hungry.' " Defendant nodded.

When the cleaner finished cleaning the kitchen, she went down the hallway and noticed dresser drawers in the hallway were open. She had cleaned the victim's house for over a year and had never seen the drawers left open. (The victim would testify the drawers were left closed that day.) It looked like someone had been looking for something in the drawers.

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[2] The victim had previously let a homeless woman and her baby stay with her.

When the cleaner returned to the kitchen, she noticed defendant with another reusable grocery bag, which also appeared to contain something. Defendant was also holding a bottle of prescription medication. Defendant asked if any more prescription medication was in the house. The cleaner said she didn't know.

Growing suspicious, the cleaner texted the victim, asking, " 'Who is your friend?' " The victim responded, " 'What friend?' " and asked the cleaner to find out defendant's name. The cleaner went to the bedroom and saw defendant sitting on the floor, rifling through something. She asked defendant's name and then texted the response to the victim, who confirmed she knew no one by that name. (By trial, the cleaner could not recall the name defendant had given her.)

The cleaner then hollered to defendant, " 'Oh, I forgot something, I have to leave, and I'll be back.' " She left and called the police.

An officer dispatched to the scene testified that he saw defendant come out the backdoor of the house and go into a little courtyard area behind a chain link fence. She was carrying several reusable grocery bags and did not react to seeing the officer. The officer asked her to come outside the fence. Defendant did, and the officer detained her.

Officers found about five bags on the driveway. They held things such as a shoebox with new shoes and the victim's receipt, an envelope addressed to the victim, an iPhone, three iPods, headphones, two pill bottles, a purse, a Nintendo Wii game, and a Lego toy. The victim later testified that some of the items in the bags had been kept in drawers.

Defendant testified that she came to Chico from San Francisco. The day she arrived, she went to a park and spoke to a woman named Michelle, who told her she might know someone offering work cleaning. Defendant spent the night in the park.

The next morning, she told a man she had met that she was sick and needed to get back to San Francisco. She said she would try to find the person offering the cleaning

job. The man pointed her in a certain direction and said, "it's one of the ones on the corner."

When she saw a woman getting out of her car with cleaning supplies, she thought, " 'that must be the place.' " She approached the cleaner, said "Good morning," and " 'Michelle told me I could come here.' " The cleaner opened the door for her.

Defendant said, " 'So you're going to start in the kitchen?' " The cleaner replied, " 'Yeah.' " Defendant said, " 'I'll go take a look around and see what I can do.' " She walked around doing "an assessment of the house." The master bedroom was a mess, with stuff needing to be picked up and laundry to do. She went to the kitchen and started "picking up stuff that had been left around, stuff that needed to be . . . organized, and stuff [defendant] didn't know where the proper place was." She saw a bottle of prescription pills and asked the cleaner, " 'Is there any other . . . prescription bottles?' " Defendant testified she wanted to know where the prescription bottles should go. She also ate some cookie dough and a biscotti from the tin when asked if she was hungry.

At one point, the cleaner said she had to leave and would be back in five minutes. Defendant thought it was the perfect time to smoke a joint. She took the bags of things she had collected in order to sort them. When she went outside to the courtyard, she saw the officer. She denied any intent to take the bags away with her.

On cross, defendant was impeached with her interview with an investigating officer.[3] She reiterated that she was there to clean and organize, and had spent her time picking stuff up, but conceded she had originally gone to the park to find heroin, and had she earned money she probably would have spent some on heroin. Her intention was to get money to return to San Francisco. When asked how much she would be paid for cleaning, defendant testified, "Nobody said anything about how much the job was going

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[3] She told the officer she had gone to the house to clean, but at trial, testified, "I didn't . . . give [the officer] the specifics that I should have."

to pay, if I was going to be given money, or—you know, sometimes people barter for goods or, you know, other things."

The jury found defendant guilty of first degree burglary with a person present. (§§ 459, 460, 667.5, subd. (c).) The trial court imposed a six-year upper term. It also imposed various fines and fees including an $850 fine, which consisted of a $200 base fine imposed pursuant to section 672, along with penalty assessments.

II. DISCUSSION

A. Defendant's CALCRIM No. 361 Challenge

On appeal, defendant first contends the trial court erred in instructing the jury with CALCRIM No. 361 that it could draw adverse inferences from her failure to explain or deny evidence against her. We conclude the challenge is forfeited, and were it not, it fails on the merits.

Prior to jury instruction, the trial court explained that it planned to instruct with CALCRIM No. 361, "Failure to Explain or Deny Testimony." Defense counsel responded, "Okay."

The court thereafter instructed the jury: "If the defendant failed in her testimony to explain or deny evidence against her, and if she could reasonably be expected to have done so based on what she knew, you may consider her failure to explain or deny in evaluating that evidence. Any such failure is not enough by itself to prove guilt. The People still must prove the defendant guilty beyond a reasonable doubt. [¶] If the defendant failed to explain or deny, it is up to you to decide the meaning and importance of that failure."

At the outset, trial counsel's assenting to the instruction forfeits the claim on appeal.[4] (See § 1259; *People v. Battle* (2011) 198 Cal.App.4th 50, 64 [" 'Failure to

[4] Defendant concedes her counsel failed to object, but maintains the challenge is preserved because the instruction affected her substantial rights in that the instruction was reversibly erroneous. Putting aside that defendant's position would render forfeiture

object to instructional error forfeits the issue on appeal unless the error affects defendant's substantial rights' "].) But even if the claim had been preserved, it would not require reversal.

We agree with defendant that the instruction was error. Nowhere in her testimony did she completely fail to explain or deny incriminating evidence, or against credulity, claim a lack of knowledge. (*People v. Cortez* (2016) 63 Cal.4th 101, 117 (*Cortez*) ["the instruction applies only when a defendant completely fails to explain or deny incriminating evidence, or claims to lack knowledge and it appears from the evidence that the defendant could reasonably be expected to have that knowledge"].)[5]

Still, a more favorable outcome is not reasonably probable absent the error. (See *People v. Saddler* (1979) 24 Cal.3d 671, 683 [applying *People v. Watson* (1956) 46 Cal.2d 818 to a challenge to an analogous CALJIC instruction]; *People v. Rodriguez* (2009) 170 Cal.App.4th 1062, 1067.) Defendant's account was simply not credible. The

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nugatory, we will nevertheless consider the merits in light of the fact that the instruction was error and to forestall a future claim of ineffective assistance of counsel. (See *People v. Vega* (2015) 236 Cal.App.4th 484, 495 ["we address the merits of defendant's attack on CALCRIM No. 361 because he claims it incorrectly states the law and in order to forestall a future claim of ineffective assistance of counsel"].)

[5] The People maintain the instruction was proper because defendant omitted, during her interview with an investigating officer, important details that she later admitted at trial, and as to the cleaning job, she testified that there was no discussion as to how much she would be paid or how long the job would last. These arguments miss the point. CALCRIM No. 361 concerns a defendant's testimony, not out of court statements. (See CALCRIM No. 361; *Cortez, supra,* 63 Cal.4th at p. 110 ["CALCRIM No. 361 . . . addresses a testifying defendant's failure to explain or deny incriminating trial evidence"].) Further, defendant's claim that there was no discussion of payment or duration is not the same as a failure to explain or deny incriminating evidence. (*Cortez, supra,* at p. 117 ["Even if the defendant's testimony conflicts with other evidence or may be characterized as improbable, incredible, unbelievable, or bizarre, it is not . . . , 'the functional equivalent of no explanation at all' "].)

cleaner and the victim's testimony showed that defendant had not merely picked things up—she had rifled through drawers, and many items in the bags had intrinsic value (or value to defendant): an iPhone, iPods, new shoes, a video game, and prescription medicine. Nothing indicated the cleaner or the victim had reason to offer untruthful testimony. By contrast, defendant's account was self-serving and implausible. As such, it is not reasonably probable that absent the challenged instruction, a more favorable outcome would have followed. Thus, even if the challenge was preserved, it would fail on its merits.

B. Defendant's Challenge to a Fine Imposed Under Section 672

Defendant next challenges the imposition of an $850 fine, which consisted of a $200 base fine imposed under section 672, along with various penalty assessments. She argues the fine is unauthorized because a section 672 fine cannot be imposed if another statute prescribes a fine for the conviction. Here, a $39 theft fine was imposed under section 1202.5. We disagree.

As defendant acknowledges, this court considered this very issue in *People v. Uffelman* (2015) 240 Cal.App.4th 195 (*Uffelman*). There, a section 672 fine was imposed along with a section 1202.5 fine.[6] Finding this permissible (*Uffelman, supra,* at p. 200), our court explained that section 1202.5 was enacted to provide an additional penalty for certain theft crimes and was not a substitute for other authorized fines: "[S]ection 1202.5 was enacted because the existing law did not require courts to order convicted defendants to 'pay an additional fine [,] with all moneys collected from those fines to be used for local crime prevention programs.' " (*Uffelman, supra,* at p. 198.)

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[6] Section 672 provides: "Upon a conviction for any crime punishable by imprisonment in any jail or prison, in relation to which no fine is herein prescribed, the court may impose a fine on the offender not exceeding one thousand dollars ($1,000) in cases of misdemeanors or ten thousand dollars ($10,000) in cases of felonies, in addition to the imprisonment prescribed."

"The clear intent of section 1202.5 is to provide for an *additional* $10 penalty when a person is convicted of specified theft crimes, to be spent exclusively on crime prevention, so as to provide a funding source for local crime prevention programs." (*Id.* at pp. 198-199.) "Nothing in the legislative history suggests that the Legislature contemplated the $10 fine as a *substitute* for other authorized fines." (*Id.* at p. 200.) As such, a section 1202.5 fine does not preclude imposition of a section 672 fine. (*Uffelman, supra,* at p. 200.)

Undeterred, defendant maintains *Uffelman* was wrongly decided as it is inconsistent with *People v. Breazell* (2002) 104 Cal.App.4th 298 at page 305 (*Breazell*), which held a section 672 fine unauthorized. But *Breazell* did not apply section 1202.5—it considered a Health and Safety Code section 11372 fine. (*Breazell, supra,* at p. 302.) The *Uffelman* court explained why this renders *Breazell* of no help here: "[S]ince Health and Safety Code section 11372 provided for a base fine, the fine imposed [in *Breazell*] under section 672 for the same offense was unauthorized, because section 672 included a limiting provision that 'was meant to ensure that a fine pursuant to section 672 would not be imposed if another statute authorized a fine for the offense.' . . . [¶] Here, in contrast to *Breazell*, there is no concern that two *base fines* were imposed . . . . The trial court imposed only one base fine for defendant's burglary conviction. Defendant's reliance on *Breazell* for the proposition that a fine pursuant to section 672 is prohibited if another statute 'authorizes' a fine for the offense overstates the holding. The fact that other statutes may authorize various types of fines for the offense at issue is not dispositive. A fine pursuant to section 672 is nonetheless permitted as long as no base fine for that offense is otherwise 'prescribed.' [Citation.] Section 1202.5 simply does not prescribe a base fine for the listed offenses so as to foreclose a fine under section 672." (*Uffelman, supra,* 240 Cal.App.4th at pp. 200-201.)

Defendant fails to convince us that *Uffelman* was wrongly decided. We therefore conclude the section 672 fine was properly imposed.

III. DISPOSITION

The judgment is affirmed.

/S/

RENNER, J.

We concur:

/S/

BLEASE, Acting P. J.

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HOCH, J.